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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 524

PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL CASUALTY INSURANCE COMPANY, a Pennsylvania corporation,

Petitioner,

v.

V. L. PHILLIPS & COMPANY, INCORPORATED, a Virginia corporation, and V. LANCE PHILLIPS,

Respondents.

PETITION TO REHEAR

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

WALTER E. HOFFMAN,
JOHN G. MAY, JR.,
ROBERT LEWIS YOUNG,
H. A. TOULMIN, JR.,
Counsel for Petitioner.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Pennsylvania Threshermen and Farmers Mutual Casualty Insurance Company, a Pennsylvania corporation, respectfully prays, pursuant to Rule 33 of this Honorable Court as amended, that a rehearing of its Petition for a Writ of Certiorari to the judgment of the United

States Circuit Court of Appeals for the Fourth Circuit, filed and entered on October 31, 1952, may be granted and that the said writ of certiorari heretofore prayed for and denied by this Honorable Court on March 9, 1953, be granted.

THE REASON WHY A REHEARING SHOULD BE GRANTED

The substantial ground available to your petitioner, though not stressed in its Petition for Certiorari, is as follows:

> *The provision in the contract between the parties, believed to have been erroneously construed by the Court of Appeals so as to make it void under the anti-trust laws of the United States, the anti-trust laws of the State of Virginia, and the common law of the State of Virginia, is one which, to make a conservative estimate, must be found in thousands, or perhaps hundreds of thousands, of contracts between insurance companies and their agents throughout the country. When these contracts were executed the term of art, "expirations", it is presumed, was understood by the contracting parties in the sense in which it theretofore had been used in the trade and interpreted by the courts. If the judgment of the Court of Appeals of October 31, 1952, be allowed to stand, and be followed by other courts throughout the country, not only your petitioner but other insurance companies, general agents, local agents, and mere solicitors will find themselves in a maze of restrictions upon freedom to contract and solicit which they never dreamed of at the time some agency contract, perhaps one to which they were not even a party,*

was executed. Indeed, some of such parties may find themselves subject to suits or prosecutions under the various State or Federal anti-trust laws.

THE NATURE OF THE PROPERTY RIGHT KNOWN AS "EXPIRATIONS"

Something of the history of this right of property, which heretofore has been universally accepted as existing in connection with the good will which a *local insurance agent* enjoys in his relations with his individual customers, is noted in a text prepared for educational purposes by John F. Neville, Esq., of the New York Bar, now Executive Secretary and General Counsel of the National Association of Insurance Agents, in the following language:

> "After the decision in the *Yonkers* case (*National Fire Ins. Co.* v. *Sullard*, 97 App. Div. 233, 89 N. Y. S. 934, decided 1904), many of the companies became convinced that there was a custom in the insurance business which gave to the local agent of a fire, casualty or surety company, the ownership of expirations upon the termination of the agency. It is natural to assume that the companies, believing a custom could be established in many cases without the benefit of a contract provision so stating, decided that nothing would be lost to them by including in agency agreements a specific provision granting this property right to the agent.
>
> "The above considerations, together with the necessity of developing an agency agreement which would unequivocally establish the agent as an independent contractor for social security purposes, added impetus to a movement which culminated late in 1937 in two agreements. First, the National Association of Insurance Agents and the Association of Casualty and Surety Executives (Companies) agreed upon a uniform casualty and surety agency agreement which was recommended by the company association to its mem-

bers. This uniform agreement contained a provision covering the ownership of expirations as follows:

" 'In the event of the termination of this agreement and provided the agent has promptly accounted for and paid to the company all premiums and other monies or securities collected or held for on behalf of the company for which the agent may be liable, the records of the agent and the use and control of expirations shall remain the property of the agent and be left in his undisturbed possession.'

Second, the National Association of Insurance Agents entered into a similar agreement with the National Board of Fire Underwriters and the Insurance Executives Association concerning the fire insurance agency agreement. One of the constructions agreed upon, pertinent to this subject, is as follows:

" 'In the event of termination of this agreement, the agent having promptly accounted for and paid over premiums for which he may be liable, the agent's records, use and control of expirations shall remain the property of the agent and be left in his undisputed possession.'

"It can readily be seen that since 1937, and probably previous to that date, the leading fire, casualty and surety insurance companies through their organizations have indicated a willingness to include such a provision in their agency agreements. . ."

In *Alliance Ins. Co.* v. *City Realty Co.*, 52 F. 2d 271, the concept of the agent's ownership of expirations was recognized as being largely dependent upon the work of the National Association of Insurance Agents.

It will be noted in this case that the language referring to rights in "expirations" is found not only in Paragraph 16 of the contract between your petitioner and the respondents, but is found also in what the respondents prefer to call the sub-agency agreement with the Clifton Mutual Insurance Agency, Incorporated, of Abingdon, Virginia, one

of the agents which your petitioner reappointed, an actionable wrong according to the opinion of the Court of Appeals. In that agreement, executed by your petitioner, the respondents and the Clifton Mutual Insurance Agency, Incorporated, appears the following language (Exhibit 13c with Motion for Summary Judgment—Clerk's Transcript of Record p. 40):

> "This agreement may be terminated at any time at the pleasure of either party by giving notice to the other in writing, but any liability for monies received by the agent shall not be discharged until all amounts are satisfactorily settled and paid by the agent. In the event of the termination of this agreement, the agent not being in default and thereafter promptly accounting for and paying over balances not in default for which he may be liable, the agent's records, use and control of the expirations shall be deemed the property of the agent and left in his undisputed possession; Otherwise the records, use and control of expirations shall be vested in the company and it's designated representative."

Of course, it is a *concessum* in this case that the other so-called sub-agents stand upon the same ground as the Clifton Mutual Insurance Agency, Incorporated, although similar provisions were not found in their contracts of appointment (R. p. 27, par. 14). Perhaps the best definition of the property right known as "expirations" is to be found in the opinion in the case of *Northwest Underwriters* v. *Hamilton,* 151 F. 2d 389, 391, 392, where it was said as follows:

> "The peculiar relationship existing between the soliciting agent and the property insurance companies has given rise to many vexed questions as to the relative

rights and responsibilities of the agent and insurance companies in relation to the property right in and the use of information accumulated by the agent and embodied in the records made by him in the course of his insurance business. *If this information was acquired by the agent while he was acting as agent for an insurance company, then under the law of principal and agent the ownership of such records obtained during the existence of the agency should belong to the principal.* However, the so-called agent or agency solicits business not on behalf of any particular insurance company but on behalf of his agency, and hence, he cannot be said to be acting as an agent for any insurance company. Having secured the business he then places it with whatever company he chooses. When he places the business with some particular insurance company he then becomes the agent for that company. It is in the course of the business of soliciting policies that the agent or agency makes such records, and these, for want of a better name, are referred to as 'expirations.' This record is in effect a copy of the policy issued to the insured, date of issuance, name of insured, date of expiration, amount, premium, property covered, and terms of insurance. . . . The information contained in these records enables the agent to a large extent to control the designation of an insurance company to write the insurance and constitutes a salable asset." (Italics supplied)

In this connection, in his aforementioned text, Mr. Neville says as follows:

"The insurance agent who represents several companies, soliciting his business for himself or his agency, does not become the agent of any company until he *places* that business with the company of his choice. This hybrid characteristic of an insurance agent gives rise to what has been called the 'peculiar relationship' and is an important reason why the ordinary rules governing agent-principal relationship do not apply.

> The 'independent contractor' status of an insurance agent, so precious to agents and concurred in by companies, would probably be impossible without the so-called 'peculiar relationship' between agents and their companies.
>
> "Finally, as has been shown, the saving grace for the proposition of an insurance agent owning his expirations lies in the unusual relationship with his companies, which has been recognized by the courts. If agents were bound by the rules governing the usual agent-principal relationship, the proposition of expiration ownership in the agent would be much more difficult to resolve. Insurance agents are fortunate that their relationship with their companies has been designated as 'peculiar'."

This "peculiar relationship" never exists where the agent is merely transacting the company's business. *Arrant* v. *Georgia Casualty Co.*, 212 Ala. 309, 102 So. 447; *Port Investment Co.* v. *Oregon Mut. Fire Ins. Co.*, 163 Ore. 1, 94 P. 2d 734, 124 A. L. R. 1432. It is for this reason that your petitioner submits that when the respondents were merely acting as its "designated representative" (R. p. 10 par. 5), they were not independent contractors, but mere agents and subject to the laws of agency.

THE PERSONS AFFECTED BY THE DECISION OF THE COURT OF APPEALS

(a) The Insured.

In *Northwest Underwriters* v. *Hamilton, supra,* citing *Beidler & Bookmyer, Inc.* v. *Universal Ins. Co.*, C. C. A. 2, 134 F. 2d 828, it was recognized as settled law that the policy holder is free to place his business where he chooses and the insurance company may accept such business through the agent or broker designated by him.

In *National Fire Ins. Co.* v. *Sullard, supra,* one of the

leading cases on the subject of expirations, as already noted, it was said as follows (89 N. Y. S. at page 939):

> "The policy holder was free to renew with any company he might see fit, or not to renew his policy at all."

In Mr. Neville's text it is said as follows:

> "It should be remembered that this subject of expiration ownership is confined to an analysis of the agent-company relationship. The insured is unaffected by any controversy which may arise between the company and the agent over the matter of expirations."
>
> * * * * * *
>
> ". . . Insurance agents cannot expect to control their insureds by means of a contract with an insurance company. The insured remains a free agent at all times, unaffected by the niceties of the agent-company relationship whether expressed in a contract or not."

The decision of the Court of Appeals in this case vitally affects the freedom of your petitioner's insureds or former insureds in the State of Virginia. They cannot place their insurance business with their favorite local agent if he happens to have been one of your petitioner's agents during the life of the general agency agreement with the respondents. Under the rule in *Kerr & Elliott* v. *Green Mountain Mutual Ins. Co.,* 111 Vt. 502, 18 A. 2d 264, cited with apparent full approval by the Court of Appeals in this case below (R. pp. 87, 88), the insured could not voluntarily, and unsolicited by anyone, place his insurance business with your petitioner. With reference to this last-cited case in *Appleman, Insurance Law and Practice,* Vol. 16, p. 538, Sec. 9026, footnote 53, it is said as follows: "To put it bluntly this case goes too far."

Such is the contention of your petitioner here. The claim

by the respondents that they can, at least in some measure, coerce the insured to procure insurance only through them or persons over whom they have control, goes too far, indeed, so far that such contention runs afoul of the local common law of Virginia, the statutory law of Virginia, and the anti-trust laws of the United States.

Coercion of the consumers (insureds) in the insurance trade is illegal. *United States* v. *South-Eastern Underwriters Assoc.*, 322 U. S. 533, 562.

(b) The Local Agent or So-Called Sub-Agent.

The ninety local agents reappointed by your petitioner, for which act of appointment the Court of Appeals has held that it is liable in damages, were admittedly the owners of their own respective businesses in the sense that they represented several insurance companies, solicited customers on their own account rather than as agent of any particular company, and therefore enjoyed a good will apart from that which might be regarded as ancillary to the business of any particular insurance company. They, of course, cannot enjoy this right of property if it is at least partially controlled by the respondents.

In their contracts of appointment these local agents made no promises limiting their freedom of action in the event that they or the other parties to the contracts should terminate the same. And during the course of their work, really in their own behalf, since otherwise they would not be the owners of their own expirations, such information as they compiled relative to persons who became insured under policies with your petitioner was their information and in no sense the secret trade information of the respondents. The authorities on this subject are fully collected in the Petition for Rehearing which your petitioner filed in the court below (R. pp. 105-114).

Indeed, an express covenant by an insurance agent or solicitor not to use ordinary information compiled by himself during the course of his work in the event that he should terminate his employment would be void as an illegal covenant in restraint of trade. *Automobile Club of Southern New Jersey* v. *Zubrin,* 127 N. J. Eq. 202, 12 A. 2d 369. Even where an agent sells his agency and there is an implied covenant not to actively solicit the customers of the agency sold, an express covenant unlimited as to time and space not to re-enter the insurance business in competition with the purchasers would seem to be void under a State anti-trust law which declares illegal any contract restricting the free pursuit of an authorized or permissible business or as tending to prevent or lessen competition. *Cottingham* v. *Engler* (Tex. Civ. App.) 178 S. W. 2d 149.

In *Woodruff* v. *Auto Owners Co.,* 300 Mich. 54, 1 N. W. 2d 450, the Supreme Court of Michigan, referring to an agent's contention that being the owner of his expirations, such ownership precluded all communications between the insurance company and its insureds who had bought their insurance through the agent, said that the so-called American Agency System did not require any such result and that it would not accept such an "extreme and unsound position."

Doubtless, many, if not perhaps all, of the ninety local agents reappointed by your petitioners had in their employ in their respective offices mere solicitors of insurance. In the *Woodruff Case, supra,* it was held that the appointment by the insurance company of a person who had been a solicitor or sub-agent under the agent plaintiff in that case was something which the insurance company might lawfully and properly do. Under the decision of the Court of Appeals in this case, the reappointed local agents who, of course, will now have to be all discharged if the decision of the Court of Appeals be allowed to stand will, in turn, be

required themselves not only to refrain from contacts with such of their customers as may have had policies with your petitioner during the life of the general agency contract to avoid liability for interference with the respondent's business, but they will be required, to avoid possible liability, to discharge all persons who may have been their own solicitors or clerks during the period named for fear that they will contact some insured who may have had a policy with your petitioner during the life of the general agency agreement.

Doubtless the good will of a local insurance agency belongs to the owner of that agency and the mere solicitors and clerks employed in and about the business of that agency acquire no separate ownership of good will, but under the rule stated this does not mean that they should not be allowed to continue in the same employ or secure employment elsewhere in the same line of business subject only to the usual rule that they must not take with them any secret and confidential information of their employer. Under the respondents' theory and under the decision of the Court of Appeals in this case, therefore, the concept of a local insurance agency as a thing of value, as a saleable business, is completely destroyed.

The coercion, intimidation or boycott of competitors in the insurance trade is illegal. *United States* v. *South-Eastern Underwriters Asso., supra,* at p. 562.

(c) The Insurance Company.

Little need be said under this heading. Your petitioner contracted with the respondents only that they should be the owners of their own expirations, which word, as already noticed, had always theretofore been understood and judicially applied as relating to the good will arising in connection with the relations between the local agent and his im-

mediate customers. If the decision of the Court of Appeals in this case be correct, in the future whatever business your petitioner does in Virginia will have to be done at the peril that the respondents had had some business dealings with some of the parties during the life of the general agency agreement. For example, if some broker, in truth the agent for some insured, had during the life of the general agency agreement placed business with one of the local agents or so-called sub-agents, who in turn had forwarded it to your petitioner through the respondents, as your petitioner's "designated representative", the respondents might claim that your petitioner had committed an actionable wrong by interfering with their concept of what constitutes their business and their good will.

Under the American Agency System concept of expirations, all your petitioner was required to do, and which it actually did in this case, was to avoid active solicitation of renewals from the immediate customers of the respondents.

THERE IS NO PRECEDENT FOR THE DECISION OF THE COURT OF APPEALS

Other than in the *Woodruff* and *Hamilton Cases,* in both of which the agent failed, only two other cases have been found in which an agent has asserted a contention like that successfully asserted by the respondents in this case. In both of these latter cases the agent was unsuccessful. In *Stowell* v. *Greenwich Ins. Co.,* 20 App. Div. 188, 46 N. Y. S. 802, reversed 163 N.Y. 298, 57 N. E. 480, one who had been the general agent for an insurance company with a fixed exclusive territory unsuccessfully contended that the insurance company committed an actionable wrong in re-engaging as its agents in the territory persons who had been the general agents' sub-agents during the life of the gen-

eral agency agreement. In *Hoffman* v. *Page-Detroit Motor Car Co.*, 262 F. 116, the plaintiff, after termination of his exclusive agency contract for a specified territory, brought suit on the theory that the defendant had committed an actionable wrong by re-employing a number of persons who had been his sub-agents during the life of his general agency contract, but recovery was denied.

THE CONTRACT AS INTERPRETED BY THE COURT OF APPEALS IS VOID UNDER VIRGINIA LAW

The authorities, including decisions of this Court, several of the United States Courts of Appeal, and of the Supreme Court of Virginia, to the effect that when a contract of agency is cancelled, no interest or property in the subject-matter of the agency remains, have already been noticed in the Petition pp. 13-14, 23-24 (See also R. pp. 96-98). Under Virginia law, to note one of the cases to which reference has been made (R. p. 107), when a covenant in restraint of trade is "ancillary to nothing", it is void under the common law and the anti-trust statutes of Virginia (*Stoneman* v. *Wilson*, 169 Va. 239, 192 S. E. 816). As to the business which the respondents did with their own immediate customers, the respondents owned something to which a covenant prohibiting active solicitation for renewals might be ancillary. However, when the respondents were engaged in forwarding the evidence of insurance already put into effect by the other local agents, the situation was one of agency not that of independent contractors, the respondents merely, as the contracts provided, acting as "company representative." When, upon the termination of the general agency agreement, the respondents no longer acted as the "company representative" with reference to the business written by other local agents in the State of Vir-

ginia, they were possessed of no right of, or interest in, property or contract right for the enjoyment of which a covenant in restraint of trade might be necessary or to which it might be ancillary.

RESPONDENTS' GOOD WILL THEORY IS NOT TENABLE

Of course, good will can have no existence except in connection with a continuing business and is not susceptible of being owned and disposed of separately from the property right to which it is incident. 38 *C. J. S.* 951. Good will, therefore, in every case belongs to the owner of the business who, in a case of agency, is the principal and not the agent. A principal may sue an agent for an injury to the good will of the business. *Whitcomb* v. *Reed-Prentice Co.,* 262 Mass. 348, 159 N. E. 922. But an agent cannot sue the principal for alleged damages to good will even in the case of an exclusive agency which the principal had a right to terminate. *Milling Co.* v. *Wells-Abbott-Nieman Co.,* 10 Ohio App. 297.

In *Metropolitan Bank* v. *St. Louis Dispatch Co.,* 149 U. S. 436, 446, Mr. Chief Justice Fuller said as follows:

> "Undoubtedly, good will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term. It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently."

Of necessity, therefore, it would seem to follow that the ownership of your petitioner's business being vested in it, the good will of that business would have to be vested in it also.

A general insurance agent has no "inchoate property right" in his agency which would support a claim against his principal after a lawful termination of the agency contract. *Pierce* v. *Connecticut General Life Ins. Co.,* 106 F. 2d 898. As to the expirations of the other local agents in the State of Virginia, therefore, the respondents own no good will. A covenant on the part of your petitioner not to trade with such other local agents would, to again employ the language of the Supreme Court of Appeals of Virginia in the case cited, be a contract in restraint of trade "ancillary to nothing" and absolutely void.

This case comes in none of the five classes of cases where a valid covenant in restraint of trade may exist listed by Judge Taft in the leading case of *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, 281, affirmed 175 U. S. 211. Your petitioner neither (1) sold its business or any part thereof to the respondents, (2) retired from a partnership with the respondents, (3) interfered with any partnership business, (4) bought any property from the respondents, (5) nor, of course, was it a servant of the respondents. While Judge Taft did say in the case cited that the five classes listed might not be absolutely exclusive, he added the following (at p. 282):

> ". . . it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely *ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee* in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. . ." (Italics supplied)
>
> * * * * * *
>
> "This very statement of the rule implies that the contract must be one in which there is a *main purpose*, to

> which the covenant in restraint of trade is *merely ancillary* . . . . . if the restraint exceeds the necessity presented by the *main purpose of the contract,* is void for two reasons: *First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and second, because it tends to a monopoly.* But *where the sole object of both parties in making the contract as expressed therein is merely to restrain competition,* and enhance or maintain prices, it would seem that there is nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. . . There is in such contracts *no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster."*

In this case the main contract was one of agency, terminable upon ninety days notice. After its termination the covenantees, except as to their own expirations, had nothing for the protection of which a covenant in restraint of trade could exist.

But, perhaps, even more important in this case is this: The respondents, who admit that the general agency contract could be lawfully cancelled according to its terms, assert that paragraph sixteen of that agreement, as a separate and distinct agreement, *gave them an exclusive right to seek new contracts with the so-called sub-agents* (R. p. 28).

The sole object of paragraph sixteen of the contract, according to the respondents, and according to the decision of the Court of Appeals, is to enable the respondents to avoid competition in their avowed desire to appropriate your petitioner's business in Virginia.

AS INTERPRETED BELOW, PARAGRAPH SIXTEEN OF THIS CONTRACT IS VOID UNDER THE FEDERAL ANTI-TRUST LAWS

The respondents contend that this asserted right to seek new contractual arrangements with the so-called sub-agents constitutes the good will of their business. Even if the concept of expirations were broad enough to include local agents, as well as immediate policy-holding customers, it would be unlawful to protect such good will by the "coercion of dealers", the local agents. *United States* v. *General Motors,* 121 F. 2d 376, 403, cert. den. 314 U. S. 618, citing *International Business Machines* v. *United States,* 298 U. S. 139.

It is well settled, as pointed out in the Petition, and to quote from the opinion in *United States* v. *Waltham Watch Co.,* 47 F. Supp. 524, 531, that "a combined refusal to deal with any one as a means of preventing him from dealing with a third person is a boycott and a boycott is prima facie unlawful." Thus, it was held in the case cited (47 F. Supp. at p. 532) that it was unlawful for "the manufacturer and the wholesale distributors" to combine "to refuse to sell to wholesalers and retailers who failed to join a boycott against certain blacklisted concerns."

When the effect of a contract is to "coerce and compel" local distributors "to narrow and limit their customary service to the public and to lessen, restrain and ultimately prevent the legitimate commerce of competitors whose goods were and had been moving in interstate commerce through" such outlets, such a contract is void under the laws of the United States. *Carter Carburetor Corp.* v. *Federal Trade Comm.,* 112 F. (2d) 722, 736.

In *North Little Rock Transp. Co., Inc.* v. *Casualty Reciprocal Exchange, et al,* 85 F. Supp. 961, aff'd. 181 F. 2d 174, cert. den. 340 U. S. 823, it was indicated that if the

effect of the Arkansas law had been "to prohibit or discourage reasonable competition," it would have been void under the Federal anti-trust laws.

It is now, of course, perfectly settled that the writing of insurance is interstate commerce, and the Federal anti-trust laws insure "protection of competition in the outlets of the flow of interstate commerce. . ." *Lorain Journal Co.* v. *United States,* 342 U. S. 143, 152.

SUMMARY

The genesis of the decision of the Court of Appeals in this case seems to be as follows (R. p. 87):

> "To allow the contention of defendant would result in its reaping where it did not sow and to unjustly enrich itself to the impoverishment of the plaintiffs."

(The theory that an insurance agent does the "sowing" and therefore should do the "reaping" is the very theory which was rejected by the United States Court of Appeals for the Third Circuit. *Pierce* v. *Connecticut General Life Ins. Co., supra,* per Circuit Judge Clark, 106 F. (2d) at p. 990.)

It is supposed that if this view of the Court of Appeals be correct, some support ought to be found for it in some one or more of the well-established principles of law. Such does not appear, however, as will be briefly noted:

Enticement—

The Court of Appeals in its opinion in this case expressly said (R. p. 88) that it was "not holding that the defendant is liable for employing the former agents . . ." Of course, this was correct because at the time of their re-appointment the ninety local agents were under contract with neither of the litigating parties. As they say, the respondents may

have entertained a hope that they could secure a State agency for some other insurance company and enter into new contracts with the local agents, but as said by Circuit Judge L. Hand in the case of *Harley & Lund Corp* v. *Murray Rubber Co.,* 31 F. 2d 932, 933, "It is not an actionable wrong to dally in the vestibules of obligation."

Interference With Contractual Relations—

For the same reason your petitioner could have been guilty of no actionable wrong under the concept of interference with contractual relations because at the time of their re-appointment the local agents were, to employ lay language "free agents."

Misuse of Confidential Information—

Your petitioner could have committed no actionable wrong under this principle of law. Since the ninety local agents obtained no confidential information from the respondents, and merely, under their contracts of re-appointment, set about to earn their living by the employment of information created by them and admittedly belonging to them, no one could enjoin these ninety local agents from the use of this information (See authorities quoted, R. pp. 108-114).

On the other hand the law has clearly condemned the theory underlying the claim of the respondents in this case.

As a Covenant in Restraint of Trade—

It is void for the following reasons:

(1) It is "ancillary to nothing" and therefore conclusively unreasonable and void.

(2) It restrains your petitioner without conferring any corresponding *lawful benefit* upon the respondents, since their only purpose was to coerce the ninety local

agents into refraining from business relations with your petitioner and to accept sub-agency agreements with them in the event that they could obtain from some other insurance company a general agency for the State of Virginia.

As a Contract in Violation of the State and Federal Anti-Trust Laws—

The respondents assert, with which assertion the Court of Appeals has agreed, that Paragraph Sixteen of the General Agency Agreement is a contract to the effect that third parties, the ninety local agents, shall be prohibited from dealing with their own customers for policies of insurance with your petitioner as means of coercing such ninety resident agents, without any contract, to switch their business to the respondents in the event that the respondents should obtain a general State agency with some other company. This stifles competition, interferes with assured's recognized right to select his own agent or broker, and interferes with the rights of the local agent, both as to his right to accept appointment as agent by an insurance company of his choice and the right to sell unfettered the business which by his own labors he has built up.

CONCLUSION

The various schemes by which manufacturers, distributors, dealers and others, have attempted to channelize and control business and markets, are, it is supposed, almost without number. Most of these have been condemned by this Honorable Court where the effect has been a destructive business practice. This case presents something almost completely new. In the usual case the control is bottomed upon a scheme of existing contracts, but here the theory is that when all contractual relations between the parties are

at an end, then there springs into existence a network of restrictions which will enable the general agent to control the freedom of action of everyone who entered into the scope of his operations before the system of contracts was cancelled. The concept asserted here by the respondents might be properly called a *"dog in the manger concept"* in that admittedly it may be of no use to them, but they contend no one else shall profit by the advantages to be derived from freedom to trade.

It is submitted that when the respondents, in communicating with other local agents, referred to their business as "your business" (R. p. 24), and expressed the hope that such local agents would "experience no undue difficulty in the re-arrangement of (their) placing" (R. p. 12), the respondents were recognizing what is or ought to be the law.

It is respectfully prayed that a rehearing may be granted and that a certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit in this case may be granted.

Respectfully submitted,

PENNSYLVANIA THRESHERMEN
AND FARMERS' MUTUAL CASUALTY
INSURANCE COMPANY

By ROBERT LEWIS YOUNG,
Counsel for Petitioner.

WALTER E. HOFFMAN,
JOHN G. MAY, JR.,
ROBERT LEWIS YOUNG,
H. A. TOULMIN, JR.,
Of Counsel.

CERTIFICATE

It is certified that this Petition for Rehearing is presented in good faith and not for the purpose of delay.

ROBERT LEWIS YOUNG,
Counsel for Petitioner.

SUPPLEMENT

FILED
MAR 28 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1952

No. 524

PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL CASUALTY INSURANCE COMPANY, a Pennsylvania corporation,

Petitioner,

v.

V. L. PHILLIPS & COMPANY, INCORPORATED, a Virginia corporation, and V. LANCE PHILLIPS,

Respondents.

PETITION TO REHEAR

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

WALTER E. HOFFMAN,
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SUPPLEMENT

PETITION TO REHEAR

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

About the very day this case was argued in the United States Court of Appeals for the Fourth Circuit below, the

State of Virginia enacted legislation which is considered most pertinent to its proper decision. This has not been heretofore brought to the attention of this Honorable Court, and was, of course, not brought to the at ention of the court below. Before quoting this legislation, it is desired, by way of introductory remark, to refer to an article by Herbert H. Naujoks, Esq., of the Chicago B published in 35 Marquette Law Review, p. 339, entitl "Eight Years After S.E.U.A.—Present Status of the I ulation of Insurance as Commerce." In this article Mr. aujoks points out (at p. 349) that after the decision by this Court in *United States v. South-Eastern Underwriters Asso.*, 322 U. S. 533, which was decided in June, 1944, and which held that insurance was commerce and if conducted across State lines was interstate commerce, the National Association of Insurance Commissioners appointed a special committee, known as the All-Industry Committee, representing all segments of the insurance industry, which took an active part in the formulation of the Act of Congress approved March 9, 1945, and which became known as the McCarran Act or Public Law 15, 79th Congress, First Session, and that thereafter this association of the insurance commissioners of all of the States, together with the committee named, cooperated to formulate a legislative program "deemed necessary to regulate effectively the insurance industry and thus to carry out the intent of Congress" (at pp. 349, 350). As a result, certain model legislation was proposed, one part of which is now sometimes referred to as the "Uniform Fair Trade Practices Act" (see American Bar Association, Section of Insurance Law, 1952, Proceedings, p. 263). Virginia has adopted this uniform law, which has now been also adopted in at least twenty-six States of the Union (see Mr. Naujoks' article cited at p. 354).

POOR COPY

The General Assembly of Virginia at its 1952 session (Acts of Assembly, 1952, chapter 317), enacted what has now become Article 6, Chapter 1, Tit. 38.1 of the Code of Virginia, 1950, as amended. This article, together with the Code numbers assigned, and insofar as pertinent, is as follows:

"ARTICLE 6

"*Unfair Trade Practices.*

"Sec. 38.1-49. Declaration of purpose.—The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. (1952, c. 317.)

"Section 38.1-50. Definition of 'person.'—When used in this article 'person' means any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, solicitors, brokers and adjusters. (1952, c. 317.)

"Sec. 38.1-51. Unfair methods of competition or unfair and deceptive acts or practices prohibited.—No person shall engage in this State in any trade practice which is defined in this article as an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. (1952, c. 317.)

"Sec. 38.1-52. Unfair methods of competition and unfair or deceptive acts or practices defined.—The following are hereby defined as unfair methods of compe-

tition and unfair and deceptive acts or practices in the business of insurance:

* * * * *

(4) *Boycott, coercion and intimidation.*—Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance."

The McCarran Act by its very terms (15 U.S.C., Sec. 1013(b)) provides that notwithstanding State legislation on the same subject the Sherman Act, shall not be inapplicable to any "agreement to boycott, coerce, or intimidate or act of boycott, coercion or intimidation." It will thus appear, it is submitted, that there is both State and Federal legislation prohibiting the enforcement of a contract interpreted as the contract between the parties to this case has been interpreted by the United States Court of Appeals for the Fourth Circuit. (As to the present system of *"dual"* control see "The Case for State Regulation of Insurance" by Artemas C. Leslie, American Bar Association, Section of Insurance Law, 1951, p. 188.)

In an earlier article entitled "Regulation of the Insurance Business and Public Law No. 15, 79th Congress, First Session" by Mr. Naujoks, published in 30 Marquette Law Review, p. 77, the author made a statement which is regarded as particularly in point here, especially in view of the fact that both Federal and State regulation is involved and that Congress apparently intends to see the insurance industry properly regulated in the absence of adequate State regulation. In the last-cited article, Mr. Naujoks said as follows (at page 92):

". . . one fact is clear and that is that the numerous questions which have arisen and the other questions

which will in the future arise can only be settled by an authoritative decision of the Supreme Court."

Respectfully submitted,

PENNSYLVANIA THRESHERMEN AND FARMERS' MUTUAL CASUALTY INSURANCE COMPANY

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